INTERIOR BOARD OF INDIAN APPEALS

Estate of Tim Tieyah

7 IBIA 234 (10/17/1979)

Judicial review of this case:
Dismissed, *Carr v. Andrus*, No. CIV-79-1300-D (W.D. Okla. Oct. 10, 1980)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

ESTATE OF TIM TIEYAH

IBIA 79-21 Decided October 17, 1979

Appeal from Order by Administrative Law Judge Sam E. Taylor Reopening Estate and Modifying Order Approving Will and Decreeing Distribution.

Reversed.

1. Indian Probate: Evidence: Presumptions

   Statutory presumption favoring legitimacy of children born within 10 months of divorce may be overcome by strong contrary evidence. Where husband of appellee's mother stated that he separated from appellee's mother several years before the birth of appellee and that another man was the father of appellee, and his statement was supported by other evidence and the circumstances of the case, the presumption was overcome.

2. Indian Probate: Evidence: Presumptions

   Where petitioner at hearing reopening estate failed to produce new evidence to show original order distributing estate 22 years earlier was in error, the evidence was insufficient to permit modification of the original order. Testimony which is merely cumulative of prior evidence or which elaborates prior evidence is not sufficient to overturn the first order.

APPEARANCES: Charles J. Chibitty, Jr., Esq., for Vena Bointy, Yvonne Monetatchi Highsoup Monetatch, Edgar Monetatchi, Pearl Monetatchi, Ramon Laurenzana, Valoris Stroup, George Laurenzana, and Lavenia Laurenzana, appellants; Amos E. Black III, Esq., for Marie Carr, appellee.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

On December 20, 1954, an order approving the will of decedent Tim Tieyah, a Comanche allottee, was entered decreeing distribution of trust property to the surviving wife and daughter of the deceased in conformity with the terms of his will. On October 29, 1976, appellee petitioned to reopen the probate of decedent's estate seeking to amend the 1954 order to obtain a finding concerning "the blood degree for myself and my descendants." Her petition to reopen was granted by the Administrative Law Judge who, on August 2 and 9, 1978, held evidentiary hearings into the relationship between appellee and decedent. On February 16, 1979, the Administrative Law Judge modified the original probate order dated December 20, 1954, by adding appellee's name to the list of persons found to be heirs of the decedent after finding her to be a daughter. The surviving devisee named in the will and the heirs of the other named devisee appeal from the ordered modification.

Appellee Marie Carr was among those notified by mail of the 1954 probate hearings into the estate of the deceased. 1/ At the hearing held on November 4, 1954, the examiner inquired into any possible interest she might have had in the estate, despite her absence. 2/ Introduced into evidence at the hearing was the affidavit of decedent, made in 1945, that:

> I was at one time married to Uk-a-petty or Francis Yellowback, Comanche Allottee 748. By our marriage we had three children, Doris Uk-a-petty, a daughter who died over 20 years ago, unmarried and without issue, Julia Tieyah, a daughter and Jester or Chester Tieyah, a son, these two are living now.

1/ The 1954 notice of hearing was mailed to appellee at "Route 1, Elgin, Okla." Appellee's 1976 petition to reopen is addressed from "Elgin, Okla. 73538." On appeal, appellee denies receipt of notice of the 1954 hearing. For purposes of this decision, it will be assumed appellee did not have notice of the hearing.

2/ Specific questions concerning appellee's relationship to decedent were addressed to both devisees. The other two appearing witnesses were asked generally about the living children of decedent. Their replies excluded appellee and her brother. Decedent's 1945 affidavit concerning paternity (which had apparently been made an issue at the probate of his former wife's estate) was received into evidence and made part of the record.

> While I was married to Uk-a-petty or Francis Yellowback we lived on her Allotment at Richard Spur. We separated and about two years later I obtained a divorce from her at Lawton, Oklahoma. After our separation Uk-a-petty began living with Manuel Whitebear, who claimed to be an Indian from Eastern Oklahoma, and lived with him for about five years. By Manuel Whitebear, she had two children, Moffet (Melford), a son and Marie, a daughter.
>
> I have been informed that at the hearing held for Uk-a-petty it was stated that Moffet and Marie were my children, but I hereby state that they are not my children, and I do not wish them to get any of my property in case of my death.

At the hearing conducted on August 2, 1978, into the reopening of this estate, appellee disavowed any claim to the trust property of the estate (which apparently remains intact, although no evidence was taken on this question). 3/ During her testimony she repeatedly asserted her sole purpose was to establish that decedent was the grandfather of her children, so that she might establish their right to share in a tribal judgment fund. 4/ She apparently equated the

---

3/ The Administrative Law Judge correctly ruled (citing Estate of Tennyson B. Saupitty, 6 IBIA 140 (1947)), that appellee had apparent grounds to seek reopening of the estate since she claimed to be an omitted heir excluded through Departmental error. Her attempt to renounce her interest in the estate is inconsistent with her claim, however. Further, it is the duty of the Secretary to determine and distribute interests in trust property based upon heirship. (See Estate of Rena Marie Edge, 7 IBIA 53 (1978).) Because of the disposition of this case, questions concerning the propriety and effectiveness of the purported renunciation are not reached.

4/ Her petition followed a Departmental determination by the Commissioner of Indian Affairs on June 16, 1977, which appears of record, summarizing the circumstances presented thus:

"Since your mother and Tim Tieyah were still legally married at the time you were conceived, there could be a presumption of law that he was your father. However, on March 5, 1945, Tim Tieyah executed a sworn statement to the effect that he and your mother had been separated for about two years before they were divorced; that she was living with Manuel White Bear during that time and for several years thereafter; and that she had two children by Manuel White Bear, a son, Moffett (Melford) and you. He formally denied that he was your father.

"In the probate of Tim Tieyah's estate the possibility of his having been your father was considered. The Examiner of Inheritance did not find that you were his child.

proceedings reopening decedent's estate with an appeal from a Departmental decision finding her children ineligible to share in the fund. 5/

Testimony at the 1978 hearing on reopening centered around domestic events in the house of decedent's second wife (appellee's mother) during 1921 and 1922, and was directed towards the statements contained in the 1945 affidavit concerning appellee's paternity. The testimony offered by the ten persons who appeared is legendary and vague. None of the evidence received contradicts the 1945 affidavit. The accounts by the witnesses of their recollections instead tend to reinforce the document, despite the apparent sympathy to appellee of several of those persons who testified. After the hearing, however, the Administrative Law Judge ruled that appellee was the decedent's daughter, basing his ruling primarily upon the ground that the Oklahoma statute legislating a presumption of legitimacy required the finding as a matter of law. 6/

_____

fn. 4 (continued)

"The testimony in the probate of your mother's estate conflicts with the findings in Tim Tieyah's probate record. In fact, it appears that it was the testimony at your mother's probate hearing that caused Tim Tieyah to formally deny that he was your father.

"All documentation submitted with your appeal has been thoroughly reviewed. We find that the sworn statement of Tim Tieyah overcomes the other evidence. Consequently, we cannot agree to your claim that he was your father. You cannot count his Comanche Indian blood in determining the degree to be ascribed to you and your descendants.

"Our findings, as outlined on the enclosed family tree chart, indicate that your grandchildren possess only 1/8 degree Comanche Indian blood, which is less than the 1/4 (2/8) degree required for enrollment. It must be concluded, therefore, they are not eligible to be enrolled as members of the Comanche Indian Tribe.

"Pursuant to the authority to decide enrollment appeals delegated to me by the Secretary of the Interior, your appeal is denied."

5/ Her stated position reflects the opinion of the Superintendent concerned who advised her in a notice dated July 18, 1977 (introduced into evidence at the hearing on reopening on August 2, 1978), that:

"Last October you filed a request for reopening of the probate of Tim Tieyah in order to increase your degree of Comanche Indian blood. As discussed at that time, we have been holding this request pending receipt of the Commissioner of Indian Affairs' decision on the appeal which you had filed. We received a copy of the Commissioner's letter to you dated June 16, 1977, and we will, therefore, proceed with processing your request for the reopening of the probate if you wish."

6/ 10 Okla. Stat. § 2. See Austin v. Austin, 418 P.2d 347 (Okla. 1966); Jackson v. Jackson, 76 P.2d 1062 (Okla. 1938); Davis v. Davis, 36 P.2d 471 (Okla. 1934).

[1] This ruling is erroneous. It ignores the character of the statutory presumption in favor of legitimacy and gives the weight of evidence to what is, under Oklahoma law, no more than a permissible inference, albeit the strongest such inference. 7/ In this case, however, the affidavit explains exactly the facts and circumstances surrounding appellee's birth. The document is supported by all the other testimony, including that of appellee when she describes her early childhood and her later investigation into the subject of this appeal. On the facts as presented by the record of both the 1954 and 1978 hearings there is no conflict. There is also no possible application for the statutory presumption, for the circumstances concerning parentage are fully explained.

[2] Although detailed, the testimony offered by appellee was new only in the sense that it came from different witnesses than those testifying at the 1954 hearing. It was merely cumulative of evidence previously offered. To justify modification of an order distributing a trust estate, especially where the order is of long standing and was originally uncontested, there must be evidence the original order was in error. 8/ Here, at the hearing on the petition to reopen, the petitioner failed to produce such evidence in support of the contentions made in her petition and the supporting affidavits supplied with it. The statutory presumption relied upon cannot be substituted for rebuttal evidence. The original order of distribution must therefore be affirmed.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the order of the Administrative Law Judge modifying the order approving will and decreeing distribution is reversed, and the order dated December 20, 1954, is affirmed.

_____

7/ See the cases cited in footnote 6: Oklahoma follows the general rule that statutory presumptions are not evidence. Even though the presumption is a strong one--(the presumption in favor of legitimacy was the strongest known to the common law)--it can be overcome. In the Board's opinion, the 1945 affidavit by decedent is a direct rebuttal of the statutory presumption favoring legitimacy.

8/ Estate of Guo-La a/k/a Thomas Jones, 7 IBIA 181 (1979); Estate of Daniel Homegun, 3 IBIA 176 (1974).

This decision is final for the Department.

//original signed
Franklin Arness
Administrative Judge

//original signed
Wm. Philip Horton
Chief Administrative Judge

//original signed
Mitchell J. Sabagh
Administrative Judge